WRIGGLESWORTH v. WILSON ANTHONY

[O.C.J. (Hashim J.) June 8, 1964]

[Kota Bharu — Civil Suit No. 24 of 1964]

Contract — Service contract — Restraint of trade — Advocate and solicitor agreeing not to practise his profession within 5 miles of town for a period of 2 years — Whether agreement void — Contracts (Malay States) Ordinance, 1950, s. 28.

Advocate & Solicitor — Injunction — Whether advocate and solicitor can be restrained from exercising his lawful profession.

By section 28 of the Contracts (Malay States) Ordinance, 1950 "Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void."

Accordingly an agreement whereby an advocate and solicitor is restrained from practising his profession within 5 miles from Kota Bharu town for a period of 2 years after the termination of his service agreement with his employer is void. The distance and place in respect of the restraint are irrelevant.

Cases referred to:—

(1) *Charlesworth* v. *MacDonald* (1898) I.L.R. 23 Bom. 113;

(2) *Brahmaputra Tea Co. Ltd.* v. *Scarth* (1885) I.L.R. 11 Cal. 545.

ACTION.

H. L. Wrigglesworth (*P. Nadarajan* with him) in person.

Punch Coomaraswamy (*Chan Sek Keong* with him) for the defendant.

Cur. Adv. Vult.

Hashim J.: The plaintiff claims an injunction to restrain the defendant from practising or carrying on the business or profession of an advocate and solicitor within a radius of 5 miles from Kota Bharu, Kelantan until 31st December, 1965.

The following facts are admitted:—

(a) The plaintiff is an advocate and solicitor and is the sole proprietor of the legal firm of "Wrigglesworth & Company" Kota Bharu, Kelantan.

(b) The defendant is an advocate and solicitor and is the sole proprietor of the legal firm of "Wilson & Company" Kota Bharu, Kelantan.

(c) On 20th September, 1962 the defendant entered into an agreement of service with the plaintiff's firm.

(d) On 7th December, 1963 the plaintiff agreed to discharge the defendant from the terms and obligations of the said agreement with effect from 31st December, 1963.

(e) Clause 8 of the said agreement stipulated that the defendant shall not for a period of two years after the termination of his engagement by the plaintiff practise as or carry on the business or profession of an advocate and solicitor within a radius of 5 miles from Kota Bharu Town without first obtaining the written consent of the plaintiff.

(f) Such written consent has not been given by the plaintiff.

Mr. Wrigglesworth for himself referred to a string of English cases on the question of reasonableness in respect of the phrase "restraint of trade".

Mr. Coomaraswamy for the defendant relied mainly on section 28 of the Contracts (Malay States) Ordinance, 1950. He also relied on the first paragraph of plaintiff's letter dated 7th December, 1963 which is marked as Exhibit "C", attached to the amended statement of defence. This paragraph reads:—

"I refer to your letter dated 29th November, 1963 confirming our mutual agreement that you 'quit from the services of (my) firm as a legal assistant as from 31st December, 1963'. I note your present request to discharge you from the terms and obligations of the service agreement and I now agree to discharge you from the terms and obligations of the agreement as effectually as had you served as a legal assistant with my firm for the full period of three years stipulated in the agreement."

Mr. Coomaraswamy contended that this letter discharged the defendant from the terms and obligations of the agreement including clause 8 of the agreement. Mr. Wrigglesworth, on the other hand, contended that the letter did not discharge the defendant from clause 8 of the agreement.

Now, section 28 of the Contracts (Malay States) Ordinance 1950 reads as follows:—

"Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void."

Mr. Coomaraswamy contended that section 28 of the Ordinance prevented clause 8 of the agreement from being enforceable. Mr. Wrigglesworth, on the other hand, contended that exception 2 to section 28 of the Ordinance applied because clause 9 of the agreement intended to make defendant a partner of plaintiff's firm.

In my opinion this case should be decided on the interpretation of section 28 of the Contracts (Malay States) Ordinance, 1950, and on the first paragraph of plaintiff's letter to defendant dated 7th December, 1963. With great respect I do not think the English cases are applicable as the Contracts (Malay States) Ordinance, 1950, is not based on the English law of contract. Section 28 is quite clear. Except in respect of the three exceptions, every agreement by which anyone is restrained from exercising a lawful profession is to that extent void. The defendant is an advocate and solicitor and can lawfully practise his profession in Malaya. Therefore, in my

opinion, any agreement to restrain him from exercising his lawful profession is void. I agree with Mr. Coomaraswamy that the distance and place in respect of the restraint are irrelevant. As regards Mr. Wrigglesworth's contention that exception 2 applies, I am of the opinion that exception 2 does not apply in this case as at the time of the execution of the agreement defendant was not then a partner of plaintiff's firm. The marginal note to exception 2 refers to agreement between partners prior to dissolution.

I next deal with the interpretation of the first paragraph of plaintiff's letter to defendant dated 7th December, 1963.

In my opinion, the English used is very clear and unambiguous. It says what it says, that plaintiff discharges the defendant from the terms and obligations of the service agreement. One of the terms of the agreement is clause 8 of the agreement and in my opinion clause 8 is included in the phrase "terms and obligations of the service agreement". The contention of Mr. Wrigglesworth that clause 8 of the agreement does not include in that phrase is not tenable. If plaintiff had so desired he would have so expressed himself in that first paragraph of his letter to the defendant. I would also refer to the last paragraph of the letter which reads as follows:—

"I do not know what you intend to do when you leave my firm but may I take this opportunity of wishing you every success in your future career."

This last paragraph of the letter would appear to strengthen the view that plaintiff had no desire to place any restraint on the defendant.

For the above reasons I am of the opinion that plaintiff must fail in this action and I dismiss it with costs.

Action dismissed.

Solicitors: *Wrigglesworth & Co.*; *Braddell Bros.*

RE CHIONH KE HU DECD.

[O.C.J. (Winslow J.) June 11, 1964]

[Singapore — Suit No. 1183 of 1962; Summons in Chambers No. 551 of 1964]

Will — Construction of — Clause imposing trust — Whether valid trust created — Whether trust created charitable.

Trusts — Trusts for persons professing or practising the Buddhist religion — Whether charitable or non-charitable — Purpose trusts.

Power of appointment — Power in the nature of trust — Bare power — Effect on each where objects are unascertainable.

The testator by his will directed his executors to convert all his property into money and after payment of his debts and funeral and testamentary expenses to divide the balance into two hundred equal shares, out of which number he made specific bequests of one hundred and seventy shares. As to the remaining thirty shares he provided in clause 5 of his will as follows: "I direct my executors to distribute the remaining thirty shares out of the said two hundred shares among such persons professing or practising the Buddhist religion and in such proportions as my executors shall in their absolute discretion think fit."

The question before the court was whether a valid disposition was created under clause 5, whether a charitable trust or a private trust or otherwise, or whether the clause failed as a disposition and there was an intestacy in respect of the thirty shares.

It was argued that the clause created a valid charitable trust; in the alternative that there was a valid non-purpose trust; in the further alternative that there was no uncertainty with reference to the objects and there was a valid private trust.

Held: (1) the words employed in clause 5 were imperative if not mandatory calling for conversion, division and distribution. These words amounted to something more than a mere discretion to distribute;

(2) clause 5 was insufficient to constitute an advancement of religion and as there was also no public benefit no valid charitable trust was created;

(3) no question of a non-charitable purpose trust arose as no purpose was defined apparent or capable of being inferred from the clause;

(4) all the objects of the power could not be ascertained and there was therefore an uncertainty with reference to the objects. Consequently the clause did not create a valid private trust and there was therefore, an intestacy in respect of the thirty shares.

Cases referred to:—

(1) *Knight* v. *Knight* (1840), 3 Beav. 148; 49 E.R. at p. 68.

(2) *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, at p. 583.

(3) *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Commissioners* [1931] 2 K.B. 465 p. 477.

(4) *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20, at p. 31.

(5) *Gilmour* v. *Coats* [1949] A.C. 426.

(6) *In re Astor's Settlement Trusts* [1952] Ch. 534.

(7) *In re Endacott, decd.* [1960] Ch. 232.

(8) *In re H. J. Ogden* [1933] Ch. 678.

(9) *In re Moore* [1901] 1 Ch. 936.

(10) *Brown* v. *Higgs* (1843), 8 Ves. 570.

(11) *In re Gestetner Settlement* [1953] Ch. 672.

(12) *In re Coates* [1955] Ch. 495.

(13) *In re Sayer* [1957] Ch. pp. 423, 425.

SUIT.

Kirpal Singh for the plaintiffs.

T. W. Ong for the defendants.

Tan Hoay Djin (Crown Counsel) for the State Advocate-General.

Winslow J.: By his will dated 22nd December, 1941, the testator appointed the first, second and third defendants to be his executors and directed them to sell, call in and convert into money all such property belonging to him as did